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No. 90-1302

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF COLORADO,
Petitioner,

v.

IDARADO MINING COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS IDARADO MINING COMPANY, NEWMONT MINING CORPORATION, AND NEWMONT SERVICES LIMITED

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QUESTION PRESENTED

Whether § 121(e)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, grants a federal court the authority to issue, at the request of a State, a mandatory injunction that requires an owner and operator to clean up a site from which hazardous substances have been released in accordance with a State-developed "remedial action" that has not been selected by the President of the United States or his delegate.

LIST OF PARTIES AND RULE 29.1 STATEMENT

The State of Colorado is the petitioner. This brief in opposition is filed on behalf of respondents Idarado Mining Company, Newmont Mining Corporation, and Newmont Services Limited. In accordance with Supreme Court Rule 29.1, these respondents state that Idarado Mining Company and Newmont Services Limited are subsidiaries of Newmont Mining Corporation. Newmont Mining has the following other subsidiaries that are not wholly-owned: Newmont Gold Company; Newmont Australia Limited; Dawn Mining Company; Southern Peru Copper Corporation; and the following Indonesian subsidiaries whose shares are directly owned by Newmont Indonesia Limited: PT Newmont NUSA Tenggara; PT Newmont Minahasa Raya; PT Newmont Bengkula Minerals; and PT Bukit Barisan Merindo.

The following individuals or entities were third-party defendants in the District Court, but did not file briefs in the Court of Appeals: Baumgartner Oil Company a/k/a Baumgartner Companies; Kenneth N. Garard; Natural Resources and Land Development Corporation; Joseph McClellan; Hecla Mining Company; Camp Bird Colorado, Inc.; Revenue-Viginius Mines Corporation; M & J Laugherty; New Trust Ruby Milling & Mining Corporation; Walker Mining & Milling, Inc.; Gayno, Inc.; Savage Mining & Oil Company, Inc.; Fleet Resources, Inc.; Silver Mountain Industries, Inc.; and Silver Hat Mining, Inc. (Kerr-McGee Corporation was also at one time a third-party defendant in the District Court, but claims against it were dismissed without prejudice.)

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BRIEF IN OPPOSITION FOR RESPONDENTS IDARADO MINING COMPANY, NEWMONT MINING CORPORATION, AND NEWMONT SERVICES LIMITED

Respondents Idarado Mining Company, Newmont Mining Corporation, and Newmont Services Limited ("respondents") respectfully urge that the petition for writ of certiorari filed in this case by the State of Colorado ("the State") be denied.[1]

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[1] Citation to the State's petition will be to "Pet."; citation to the petition's appendix will be to "Pet. App."

STATEMENT OF THE CASE

1. *The Statutory Scheme.* This case arises under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"),[2] as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"),[3] 42 U.S.C. §§ 9601 to 9675.[4] CERCLA is designed to facilitate the cleanup of environmental contamination due to releases of hazardous substances, and sets forth several mechanisms for responding to such releases. More importantly for present purposes, CERCLA carefully delineates the respective powers of the Federal Government, the States, and private parties under it.

CERCLA § 111 provides for the creation of a "Superfund" to finance cleanup actions at sites affected by releases or threatened releases of hazardous substances. Section 104(a) authorizes the Federal Government to undertake removal and remedial actions to clean up those sites, using money from the Superfund. Alternatively, under § 104(d), the Federal Government may enter into cooperative agreements with States allowing them to conduct cleanups using Superfund money.[5]

In order that the financial burden of cleanup actions may be shifted to those responsible, § 107(a) of CERCLA authorizes the United States to sue responsible parties (which include the "owner and operator" of the site) to recover costs incurred in responding to releases of haz-

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[2] Pub. L. No. 96-510, 94 Stat. 2767 (1980).

[3] Pub. L. No. 99-499, 100 Stat. 1613 (1986).

[4] In this brief in opposition, our citations will be to the section numbers in CERCLA; the parallel citations to the United States Code are contained in the Table of Authorities.

[5] The State of Colorado has not entered into such a cooperative agreement.

ardous substances.[6] The right to bring suit to recover response costs is not limited, however, to the Federal Government. Even when no cooperative agreement permitting the use of Superfund money exists, States and other persons may proceed under state law to conduct cleanup of sites affected by hazardous substances (*see* CERCLA § 114(a)); and § 107(a) allows States or private persons who have incurred response costs not financed by the Superfund to bring cost recovery actions against the responsible parties. When a cost recovery action is brought by either the United States or a State, the responsible parties are liable for all response costs that are "not inconsistent with" the National Contingency Plan ("NCP"), which is a set of substantive and procedural regulations issued by the Environmental Protection Agency ("EPA") to govern cleanup actions under CERCLA. CERCLA § 107(a)(4)(A).[7]

In addition to authorizing the Federal Government to conduct cleanup actions financed by the Superfund and to recover its response costs under § 107, CERCLA also authorizes the United States to seek injunctive relief. Section 106(a) states that "when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary . . . ." In that event, a federal district court "shall have jurisdiction to grant such relief as the public interest and the equities of the case may require." *Id.* The relief available to the United States under § 106(a) can include a mandatory injunction requiring the responsible party to perform a cleanup.

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[6] Sections 107(a)(4)(C) and 107(f)(1) also make responsible parties liable to Federal and State Governments for damages for injury to, destruction of, or loss of natural resources.

[7] The present NCP, which was adopted by the EPA in 1990 (55 Fed. Reg. 8666), is codified at 40 C.F.R. part 300 (1990).

See, e.g., United States v. *Conservation Chemical Co.*, 619 F. Supp. 162, 192 (W.D. Mo. 1985).[8]

The State makes no claim in this case that it is entitled to a mandatory injunction under § 106(a). Rather, it contends that § 121(e)(2) of CERCLA allows a State to obtain a mandatory injunction requiring that responsible parties perform State-selected cleanup actions. Section 121 was added to CERCLA in 1986 by SARA. It deals generally with cleanup standards in remedial actions undertaken by the Federal Government or its delegates. Section 121(a) begins by providing that "[t]he President shall select appropriate remedial actions determined to be necessary to be carried out under section 104 of this Act or secured under section 106 of this Act which are in accordance with this section and, to the extent practicable, the national contingency plan, and which provide for cost-effective response." Section 121(b) contains general rules for selection of Federal remedial efforts, and § 121(d) prescribes requirements as to the degree of cleanup that must be achieved in such Federal actions. Section 121(f) contains detailed procedures for State involvement in the Federal Government's choice of remedial actions, stating in part: "The President shall promulgate regulations providing for substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State." § 121(f)(1).

Finally, there is § 121(e), on which the State relies. Section 121(e)(1) provides generally that no federal, state, or local permit is required for a remedial action carried out onsite in compliance with § 121. Then § 121(e)(2) begins with the sentence on which the State rests its argument that it is entitled to the mandatory injunctive relief sought here: "A State may enforce any Fed-

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[8] Section 106(a) also authorizes the President or his delegate to issue orders "as may be necessary to protect public health and welfare and the environment."

eral or State standard, requirement, criteria, or limitation to which the remedial action is required to conform under this Act in the United States district court for the district in which the facility is located." The remainder of § 121(e)(2), however, deals exclusively with the requirements for consent decrees.[9]

2. *Proceedings in the Courts Below.* The State of Colorado brought this suit in 1983 in the District Court for the District of Colorado against Idarado Mining Company, Newmont Mining Corporation (Idarado's corporate parent), and Newmont Services Limited (a Newmont Mining subsidiary that had provided contract services to Idarado). The State's complaint, as amended, sought to hold defendants liable under § 107(a) of CERCLA for costs incurred and to be incurred by the State in cleaning up former mining sites in southwestern Colorado owned by Idarado.[10] Following the enactment of SARA in 1986, the State supplemented its pleadings to

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[9] The remainder of § 121(e)(2) states:

> "Any consent decree shall require the parties to attempt expeditiously to resolve disagreements concerning implementation of the remedial action informally with the appropriate Federal and State agencies. Where the parties agree, the consent decree may provide for administrative enforcement. Each consent decree shall also contain stipulated penalties for violations of the decree in an amount not to exceed $25,000 per day, which may be enforced by either the President or the State. Such stipulated penalties shall not be construed to impair or affect the authority of the court to order compliance with the specific terms of any such decree."

[10] The State's amended complaint also included pendant state law claims, but those state law claims were dismissed by the District Court in 1985. The State also sought damages for loss of natural resources under CERCLA § 107(a). Respondents filed third-party claims against other owners of mining facilities in the area. (Those third-party defendants are enumerated in the List of Parties, *supra*.) The District Court severed both the State's claims for natural resources damage and respondents' third-party claims, and stayed them for later resolution.

seek an injunction directing that respondents themselves carry out the cleanup of the Idarado sites.

Basically, the State asserted that certain metals that are hazardous substances under CERCLA were being released from Idarado's tailings piles, mine portals, and waste rock piles into area waters, where those metals were adversely affecting the habitat for aquatic life.[11] In March 1987, the State issued an administrative "Record of Decision" that contained its proposed plan for remedial actions at the Idarado sites to prevent or minimize those releases of metals. Thereafter, a bench trial was held in the District Court that took over 26 trial days from April through August 1987.[12] The testimony focused primarily on whether the various environmental harms alleged by the State justified the remedial actions proposed, and on whether the components of the State's proposed cleanup plan were technically feasible, cost-effective, and otherwise consistent with the NCP.

On February 22, 1989, the District Court issued a memorandum opinion and order. *State of Colorado* v.

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[11] *See* Pet. App. at 50-53, 83-85. Tailings are finely ground ore from which most of the valuable metals have been removed by the milling process. Water naturally flowing over tailings piles can sometimes cause the remaining metals to be released. Mine portals are openings that were originally used for access to underground mines. Water flowing through a mine from seepage or by groundwater movement can pick up metals and then enter the environment through the portals. Waste rock is material removed from a mine that did not have enough metal content to warrant further processing. As with tailings, water flowing over waste rock can sometimes cause metals to be released.

[12] The District Court has earlier ruled that Newmont Mining was liable under CERCLA § 107 as an "owner and operator" of the Idarado sites, while Newmont Services was liable as an "operator." *State of Colorado* v. *Idarado Mining Co.*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 20578 (D. Colo. 1987). Respondents challenged this ruling in the Court of Appeals, but that court declined to decide the issue at this time on the ground that it would be "best resolved on appeal from a final judgment." Pet. App. at 13-14.

Idarado Mining Co., 707 F. Supp. 1227 (D. Colo. 1989), Pet. App. at 33-124. In general, the District Court concluded that the State's proposed remedial plan, with certain modifications ordered by the court, was "not inconsistent with the NCP" and that respondents were liable under § 107(a) of CERCLA for the costs of carrying out that plan. Pet. App. at 116-17. The court also rejected, without elaboration, respondents' claims that it lacked authority under CERCLA to enter a mandatory injunction requiring them to carry out the State's remedial plan.[13] The court "ordered and mandatorily enjoined" respondents "to conduct the remedial activities as described in the State's Record of Decision, to the extent they are in accordance with this Order . . . ." Pet. App. at 119-20.

Respondents appealed the issuance of the injunction pursuant to 28 U.S.C. § 1292(a)(1). After first staying the injunction pending appeal, the Court of Appeals for the Tenth Circuit reversed and remanded the case with directions to the District Court to vacate the mandatory injunction. *State of Colorado* v. *Idarado Mining Co.*, 916 F.2d 1486 (10th Cir. 1990), Pet. App. at 1-32. The Court of Appeals held, *inter alia*, that the District Court lacked authority either under CERCLA § 121(e)(2) or under its inherent power in equity to issue the mandatory injunction sought by the State. Pet. App. at 14-28. The Court of Appeals subsequently denied the State's petition for rehearing, Pet. App. at 125-27, and the State's petition for certiorari followed.

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[13] Pet. App. at 40-41. The District Court simply quoted the first sentence of § 121(e)(2) of CERCLA, and concluded without further explanation: "Thus injunctive relief also is available to the State under CERCLA." *Id.* at 41.

ARGUMENT

The Court should deny the State's petition for certiorari. As we now show, the result reached by the Court of Appeals in this case is not in conflict with any other appellate decision and was supported by briefs filed in the Tenth Circuit by the United States as *amicus curiae*. Moreover, that court's construction of CERCLA was clearly correct, and no policy issue is presented by this case that is worthy of this Court's review.

A. The Result Reached by the Court of Appeals Is Consistent With the Results in All Other Cases and Is Supported by the United States.

By stating that the Tenth Circuit's decision is the "only court decision to rule on states' ability to use § 121(e)(2) to enforce state-selected remedial actions" (Pet. at 10), the State concedes that its petition is not based on any conflict in the circuits. What the State does not make clear, however, is that several other courts, including the Second and Ninth Circuits, have considered requests under CERCLA by both States and private parties for mandatory injunctions ordering responsible parties to perform cleanup actions, and those other decisions have uniformly held that only the Federal Government is entitled to obtain such a mandatory injunction under CERCLA.

The Court of Appeals correctly stated that, before the enactment of SARA in 1986, "several courts had rejected the position that injunctive relief was available to states and other non-federal plaintiffs" under CERCLA. Pet. App. at 14, *citing, e.g., State of New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1049-50 (2d Cir. 1985).[14]

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[14] *Accord, United States* v. *Conservation Chemical Co.*, 619 F. Supp. 162, 231-32 (W.D. Mo. 1985); *Cadillac Fairview/California, Inc.* v. *Dow Chemical Co.*, 21 Env't Rep. Cas. (BNA) 1108, 1115-17 (C.D. Cal. 1984), *aff'd in pertinent part*, 840 F.2d 691, 696-97 (9th Cir. 1988); *Velsicol Chemical Corp.* v. *Reilly Tar & Chemical Corp.*, 21 Env't Rep. Cas. (BNA) 2118, 2121 (E.D. Tenn. 1984).

Furthermore, as the Court of Appeals also noted, "[c]ourts have adhered to the view that injunctions are not available to states and other non-federal plaintiffs under CERCLA, even after the 1986 SARA amendments." Pet. App. at 15-16, *citing Cadillac Fairview/California, Inc.* v. *Dow Chemical Co.*, 840 F.2d 691, 696-97 (9th Cir. 1988); *United States* v. *Cannons Engineering Corp.*, 720 F. Supp. 1027, 1052 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990); *United States* v. *Akzo Coatings of America, Inc.*, 719 F. Supp. 571, 577-78 (E.D. Mich. 1989) (state government intervening plaintiff);[15] *McGregor* v. *Industrial Excess Landfill, Inc.*, 709 F. Supp. 1401, 1408-09 (N.D. Ohio 1987), *aff'd*, 856 F.2d 39 (6th Cir. 1988); *State of Vermont* v. *Staco, Inc.*, 684 F. Supp. 822, 835 (D. Vt. 1988) (state government plaintiff); *Brewer* v. *Raven*, 680 F. Supp. 1176, 1180 (M.D. Tenn. 1988); *Utah State Department of Health* v. *Ng*, 649 F.

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[15] The State in its petition quarrels with the Tenth Circuit's reliance on *Akzo Coatings*, claiming that the case "strongly supports" its interpretation of § 121(e)(2) (Pet. at 12-13 n.4). The State's reading of that case is incorrect. In *Akzo Coatings*, the Federal Government had filed a proposed consent decree with the district court, and the State of Michigan sought intervention challenging the adequacy of the EPA-selected remedial plan. Michigan claimed, *inter alia*, that § 121(e)(2) gave it the right to seek injunctive relief to incorporate additional requirements into the EPA-selected remedial plan. 719 F. Supp. at 577. The *Akzo Coatings* court rejected this argument in the passage quoted by the State in its petition: "[T]his section only provides the State with authority to ensure that the relevant parties comply with the remedial action selected for the site. It does not empower the State to require the parties to comply with standards that were not embodied in the remedial action plan." *Id.* at 578. In context, the *Akzo Coatings* court was plainly referring to a remedial plan *selected by EPA* under § 121. That is shown by the next paragraph where the court referred to the "elaborate mechanism" that Congress placed in § 121(f) "that assures that remedial action plans *adopted by the EPA* comply with all applicable state and federal standards." *Id.* at 578 (emphasis added). Thus, the Court of Appeals correctly relied upon *Akzo Coatings*.

Supp. 1102, 1105-06 (D. Utah 1986) (state government plaintiff).

In short, the decision below is one of many appellate and district court decisions that have held that states and private parties cannot obtain mandatory injunctions under CERCLA that require responsible parties to perform remedial actions, because only the Federal Government can obtain such relief under CERCLA. The only thing novel about the decision in this case is that it represents the first appellate rejection of an attempt by a State to obtain such a mandatory injunction under CERCLA § 121(e)(2). That factor is hardly enough to elevate this case into one warranting review by this Court.

This is particularly so in view of the fact that the United States supports the result reached below. The Department of Justice and EPA submitted briefs in the Court of Appeals for the United States as *amicus curiae* that took the position that "no part of CERCLA grants jurisdiction to issue the mandatory injunction appealed from." [16] This interpretation of the statute by the agencies charged with its administration and enforcement is, of course, entitled to weight,[17] and furnishes another reason why the petition for certiorari should be denied.

B. The Court of Appeals' Construction of CERCLA Was Clearly Correct.

In addition to the fact that the State's petition is not based on a conflict in the circuits and espouses an interpretation of CERCLA opposed by the United States,

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[16] Brief for the United States, *Amicus Curiae*, in Partial Support of Appellants at 2, in *State of Colorado* v. *Idarado Mining Co.*, No. 89-1077 (10th Cir.); Reply Brief for the United States, *Amicus Curiae*, in Partial Support of Appellants in *State of Colorado* v. *Idarado Mining Co.*, No. 89-1077 (10th Cir.).

[17] *See, e.g., Chemical Manufacturers Association* v. *Natural Resources Defense Council*, 470 U.S. 116, 125 (1985); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

certiorari should also be denied on the ground that the State's position has no merit. Although the State accuses the Court of Appeals of engaging in "improper" "judicial lawmaking" (Pet. at 11), the converse is true. In order for that court to have accepted the State's argument, it would have had to ignore the language of § 121(e)(2), remove that provision from its statutory context, and overlook the pertinent legislative history.

1. *The "Peculiar" Results of the State's Interpretation.* Before one even gets to the context and language of § 121(e)(2) and its legislative history, it must be pointed out that acceptance of the State's arguments would both distort CERCLA's statutory structure and lead to an incongruous result. As discussed above, § 107(a) authorizes the Federal Government, a State, or any other person who incurs costs in responding to the release of hazardous substances to bring an action to recover those costs. By contrast, § 106(a) authorizes only the United States to bring an action seeking a mandatory injunction requiring private parties to undertake cleanup actions, and § 106(a) limits even the Federal Government's authority to obtain such injunctions to situations where the President determines that "there may be an imminent and substantial endangerment to the public health or welfare or the environment . . . ."

As both the Tenth Circuit and other courts have recognized, acceptance of a State's argument that it can generally obtain mandatory injunctive relief would conflict with the fact that § 106 explicitly grants such authority only to the Federal Government. *See* Pet. App. at 14-15. Moreover, as the Court of Appeals further recognized, acceptance of the State's argument would lead to the "[p]eculiar" result that, under CERCLA, "the states would enjoy greater injunctive authority than the federal government . . . ." Pet. App. at 22. This is because, under its interpretation, the State could obtain injunctive relief under § 121(e)(2) without making a

showing that the prerequisite for such relief under § 106 (a) has been met—namely, a determination by the President that "there may be an *imminent and substantial endangerment* to the public health or welfare or the environment . . ." (emphasis added). The State has provided no basis for concluding that Congress could have intended such an incongruous result.[18]

2. *The Statutory Context.* Even if one ignores the anomalous result that would be created by the State's construction of § 121(e)(2), that interpretation must still be rejected. In context, § 121(e)(2) is clearly limited to giving a State the right to seek an injunction enforcing the requirements contained in a remedial plan chosen by the Federal Government or its delegates. The reference to "the remedial action" in § 121(e)(2)'s authorization of an action by a State to "enforce any Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform . . ." does not mean just any remedial action. As the Court of Appeals held, that reference "pertains to the

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[18] The State in its petition does argue that its right to seek an injunction would be limited by the statute's definition of "remedial action," Pet. at 14, but this concession does not change the fact that the State is seeking a greater right to obtain injunctive relief under CERCLA than that possessed by the Federal Government. The definition of "remedial action" in CERCLA § 101(24) does require that there be a "substantial danger to present or future public health or welfare or the environment," but it does not require that there be an "*imminent* and substantial endangerment" to the public health or welfare, as § 106(a) does. Moreover, the State's claim (Pet. at 15) that the Federal Government would not have "to go through the rigorous steps of selecting remedial action in order to get an injunction under CERCLA § 106(a)" is both incorrect and irrelevant. The Federal Government would obviously have to select a remedial action before seeking a mandatory injunction to require someone to carry it out. In any event, since the Federal Government can only obtain mandatory injunctive relief under limited conditions, there is no basis to interpret CERCLA to allow States to obtain such injunctive relief in instances where those conditions have not been met.

remedial action encompassed by § 121[, and §] 121 unquestionably envisions a remedial action selected by the federal government or its delegates." Pet. App. at 19-20.

That conclusion is clearly correct, for § 121 deals entirely with the requirements that must be met by Federal cleanup actions. Sections 121(a) and (b), for instance, set out the general requirements that the Federal Government must meet in selecting remedial actions. Section 121(d)(2) prescribes the extent to which a remedial action chosen by the President or his delegate must meet a Federal or State "standard, requirement, criteria, or limitation," and § 121(f)(2) establishes procedures for a State to seek review of a decision by the Federal Government to select a remedial action that will not attain "a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation . . . ." [19] Thus, in context, the reference in § 121(e)(2) to a "Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform . . ." is to a requirement contained in the remedial plan selected by the Federal Government in compliance with the other provisions of § 121.

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[19] As the Court of Appeals noted (Pet. App. at 22), the necessary implication of the State's construction of § 121(e)(2) would be to render the provisions of § 121(f)(2), which allow a State to seek review of an EPA-selected plan, superfluous. There would be no need to have such a procedure if a State could circumvent it by obtaining mandatory injunctive relief in the first instance. The State in this case has emphasized that its chosen remedy cannot conflict with an EPA-selected remedial action inasmuch as EPA has not chosen to investigate the Idarado sites. That point is irrelevant, however. There is no language in § 121(e)(2) that could conceivably limit a State's right to seek injunctive relief only to those sites where EPA has failed to develop a Federal remedial plan. As the court below said, "construing § 121(e)(2) to authorize injunctive relief in these circumstances, but relegating states challenging federal consent decrees to the procedures in § 121(f)(2)(A) & (B) would amount to pure judicial legislation." Pet. App. at 22.

As the Court of Appeals held (Pet. App. at 18-21), the purpose of § 121(e)(2) is to complement the rest of § 121 by giving an affected State a means of compelling a responsible party to comply with the substantive requirements contained in the remedial action selected or secured by the Federal Government, particularly when that remedial action has been secured by a consent decree. The remainder of § 121(e)(2), after all, deals with the requirements for consent decrees. Moreover, the only explanation in the 1986 Conference Report for the provision at issue here is that "States are given the authority to enforce *requirements of consent decrees* to which the remedial action must conform, in Federal district court." [20]

3. *The Statutory Language.* The State's argument that § 121(e)(2) gives it the right to obtain mandatory injunctive relief to compel compliance with its remedial plan also ignores that provision's plain language. Section 121(e)(2) only authorizes a State to enforce a standard, requirement, criteria, or limitation "to which the remedial action is *required* to conform under this Act" (emphasis added). The only provision of CERCLA that *requires* remedial actions to conform to particular standards, requirements, criteria, or limitations is § 121(d)(2), and that provision deals solely with Federal remedies selected or secured under § 104 or § 106. CERCLA does not "require" State-selected plans to conform to any particular requirements.

The State argues, however, that § 107(a) of CERCLA required it to select a cleanup plan that is "not inconsistent with" the National Contingency Plan (Pet. at 15-16). That is not so. Section 107(a) simply establishes that, *if* the State wishes to recover its response costs, it can do so only if those costs are "not inconsistent with" the NCP.

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[20] H.R. Rep. No. 99-962, 99th Cong., 2d Sess., at 249 (1986) (emphasis added).

Neither CERCLA nor the NCP *requires* that a State seek recovery of its response costs, and thus neither *requires* that a State's remedial plan conform to the NCP or any other requirements.[21] In essence, the State's argument is that, because the District Court found its plan to be "not inconsistent with" the NCP for purposes of cost recovery under § 107(a), its plan was *required by CERCLA* to conform to the NCP. That conclusion plainly does not follow.[22]

4. *The Legislative History.* The State's construction of § 121(e)(2) likewise finds no support in the legislative history. As discussed above, p. 8 & n.14, the settled rule at the time SARA was enacted in 1986 was that only the Federal Government could obtain mandatory injunctive relief under CERCLA. Yet, there is no indication in the legislative history of SARA that Congress intended through § 121(e)(2) to overrule such cases as the Second Circuit's decision in *State of New York* v. *Shore Realty*,

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[21] As EPA has said in this regard, the NCP "does *not* require that States select remedies for non-Fund-financed State-lead enforcement sites in conformance with CERCLA section 121 and the remedy selection process specified in the NCP. However, where a State-selected remedy does not so conform, . . . State cost recovery efforts may be hindered." EPA Preamble to Proposed Amendments to NCP to Conform with SARA, 53 Fed. Reg. 51394, 51458 (Dec. 21, 1988) (emphasis added).

[22] The State also takes issue with the Court of Appeals' ruling (Pet. App. at 25-26) that certain former provisions of the NCP, notably 40 C.F.R. § 300.68(i) (1989), were not applicable to the State because they apply only to a "lead agency," which includes only the Federal Government or its delegate. According to the State, the former NCP provision which sets forth the criteria for a non-Federal cost recovery action, 40 C.F.R. § 300.71(a)(2) (1989), required its plan to conform to other requirements of the NCP, including § 300.68(i), regardless of whether it was a "lead agency" (Pet. at 16 n.5). That argument fails for the same reason discussed in the text: Nothing in the NCP *requires* the State to seek recovery of its response costs. Indeed, § 300.71(a) itself begins by saying that any person (including a State) "may" undertake a response action for which it can seek cost recovery under § 107 of CERCLA (Pet. App. at 148).

supra. On the contrary, as shown above, p. 14, the only explanation in the 1986 Conference Report for the first sentence of § 121(e)(2) is that the provision was intended to give States the right to enforce requirements contained in consent decrees.[23]

C. This Case Does Not Present Policy Issues Warranting This Court's Review.

The State's invocation (Pet. at 7) of the public trust doctrine and its rights to protect the environment within its borders notwithstanding, the decision of the Court of Appeals in this case does not raise important policy issues demanding this Court's review. Under that decision, the State is still authorized to clean up the Idarado sites itself and to bring a cost recovery action under CERCLA § 107. While the State asserts that "[m]ost state governments do not have the necessary resources or experience to actually perform cleanups of hazardous substances" (Pet. at 9), that assertion is unsupported. Indeed, if that were so, one could reasonably question whether such States have the "necessary resources or experience" to devise detailed cleanup plans capable of being enforced by mandatory injunctions.[24]

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[23] Moreover, in enacting SARA in 1986, Congress rejected a provision that passed the House authorizing States and other persons to obtain injunctive relief against a party responsible for a release or threatened release from a "hazardous waste disposal site" that presents "an imminent and substantial endangerment to public health or the environment." *See* H.R. Rep. No. 99-253 (Part 5), 99th Cong., 1st Sess. 242 (1985). The Conference Committee that framed the final version of SARA, while generally adopting the House's citizens suit provision, "delete[d] the House provision which authorizes suits for imminent and substantial endangerment." H.R. Rep. No. 99-962, *supra*, at 273. This deletion is further proof that Congress did not intend in 1986 to override decisions, such as *Shore Realty*, which had held that CERCLA did not authorize courts to issue mandatory injunctive relief at the request of parties other than the Federal Government.

[24] The State's allegation (Pet. at 10) that two other, unidentified States have had the decision of the Tenth Circuit "thrown in their

More fundamentally, the State's arguments are directed to the wrong forum. If the State can present a compelling policy argument that it should have the right to obtain mandatory injunctions to require responsible parties to perform cleanups, it should present that case to Congress or, alternatively, to the Colorado legislature. Other States have the authority under their own State statutes to obtain, under specified circumstances, the sort of mandatory relief that Colorado seeks in this case.[25]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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faces" in settlement negotiations is entitled to no weight. What one party tells another in negotiations is scarcely a reason for this Court to grant certiorari.

[25] *See, e.g.*, Ariz. Rev. Stat. Ann. § 49-287; Cal. Health & Safety Code § 25358.3(a)(3); Me. Rev. Stat. Ann. tit. 38, § 1365.1; Mass. Gen. Laws Ann. ch. 21E, §§ 9, 11; Minn. Stat. § 115B.18; N.C. Gen. Stat. § 130A-310.5; Or. Rev. Stat. § 465.260; Pa. Stat. Ann. tit. 35, §§ 6020.505(d)-(e); S.D. Codified Laws Ann. § 34A-12-11; Tenn. Code Ann. § 68-46-206(a).